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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 30186 (Sub.-No.3)<sup>1</sup>**

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**TONGUE RIVER RAILROAD COMPANY, INC.  
CONSTRUCTION AND OPERATION - WESTERN ALIGNMENT**

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**REPLY TO NORTHERN PLAINS RESOURCE COUNCIL AND MARK FIX'S  
PETITION FOR RECONSIDERATION**

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August 25, 2011

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<sup>1</sup> The Petition also embraces *Tongue River R.R.—Rail Construction and Operation--In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket 30186, and *Tongue River R.R. Company—Rail Construction and Operation—Ashland to Decker, MT*, STB Finance Docket No 30186 (Sub-No. 2).

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**PREFACE AND SUMMARY OF ARGUMENT**

Pursuant to 49 C.F.R. § 1115.3 Tongue River Railroad Company, Inc. ("TRRC") hereby replies to the July 25, 2011 Petition for Reconsideration ("Reconsideration Petition") filed by Petitioners Northern Plains Resource Council and Mark Fix (collectively "NPRC").

NPRC asks the Board to reconsider its denial of NPRC's July 26, 2010 Petition to Reopen because NPRC believes it has shown that the Board's "prior action will be affected materially because of new evidence or changed circumstances." Reconsideration Petition at 2 (quoting 49 C.F.R. § 1115.3(b)(1)); Reconsideration Petition at 17 (reconsideration requested "due to the material change in circumstances and the substantial new evidence.")<sup>2</sup> NPRC's burden here is to show that there is additional new evidence or changed circumstances that

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<sup>1</sup> The Petition also embraces *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket 30186 ("TRRC I"), and *Tongue River R.R. Company—Rail Construction and Operation—Ashland to Decker, MT*, STB Finance Docket No 30186 (Sub-No. 2) ("TRRC II"). Finance Docket No. 30186 (Sub No.3), Tongue River Railroad Company, Inc. - Construction and Operation-Western Alignment (STB 2007) is hereafter referred to as "TRRC III."

<sup>2</sup> Petitioners do not claim, and have not shown, that reconsideration is warranted under the third prong allowed under the Board's rules, *i.e.* "material error" in the Board's decision. See 49 C.F.R. § 1115.3(b)(2).

would warrant reconsideration of the Board's June 15, 2011 decision denying its Petition to Reopen. NPRC cannot support its request for reconsideration by citing the same alleged new evidence and changed circumstances that the Board has already found insufficient, but instead must demonstrate that there has been some material change or new evidence that didn't exist at the time of the June 15 Decision. *See David Monte Verdi, Michael Thomas, Charles Riedmiller, Jeffrey Baxter, and John Herbrand and Genesee Valley Transportation Co., Inc.—Continuance in Control Exemption—Mohawk & Adirondack R.R. Co., Inc.; Mohawk & Adirondack R.R. Co., Inc.—Acquisition and Operation Exemption—Consolidated Rail Corp.*, Docket Nos. 31843, 31846, 1992 ICC LEXIS 221 at \*3 (served Oct. 30, 1992) (denying reconsideration on the ground that petitioner failed "to present new evidence or show how circumstances have changed since the June 30, 1992 decision [denying reopening]").

Just as it failed to present new evidence or changed circumstances that would warrant reopening of these proceedings, NPRC has now again failed to present any new evidence or changed circumstances that would warrant reconsideration. Its Reconsideration Petition instead largely rehashes the same points previously presented in its Petition to Reopen concerning Otter Creek coal leases and climate change studies.

The Reconsideration Petition presents only one item of "new evidence," but it is not material. As of July 1, 2011 there has been a change in ownership of the TRRC through which Arch Coal, Inc. ("Arch Coal"), parent of the lessee of the Otter Creek tracts, has obtained a one third interest in the stock of an entity which owns all of the stock of TRRC. This fact, however, has no material bearing on the issues raised by the Petition to Reopen and offers no basis for reconsideration. The change in ownership of TRRC does not, as NPRC asserts, support the need for further environmental analysis beyond that already done by the Board relative to the rail line

and mines that may be developed at Otter Creek. Nor does it demonstrate that such supplemental environmental review would yield any different results than were reached in the several EISs completed for the TRRC line.

NPRC also argues that the Board was wrong in finding that TRRC had detrimentally relied on the Board's decisions. However, NPRC's argument is not correct; as discussed below there has been significant detrimental reliance. Nor is it material to the denial of the Petition to Reopen. In addition, NPRC argues that a major federal action remains to be taken in this proceeding. Even assuming *arguendo* that that questionable proposition is true, it provides no basis for reconsidering the Board's finding that the Petition to Reopen failed to present any credible reason for reopening.

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For the reasons set forth below, TRRC respectfully requests that NPRC's July 25, 2011 Reconsideration Petition be denied.

**I. The Reconsideration Petition Largely Rehashes the Already-Denied Petition to Reopen**

Pursuant to 49 C.F.R. § 1115.3(b), the Board may only grant a petition for reconsideration if petitioner demonstrates that “(1) the prior action will be affected materially because of new evidence or changed circumstances [or] (2) the prior action involves material error.” NPRC argues that the Board should grant the Reconsideration Petition because “Northern Plains has shown that the STB’s, ‘prior action will be affected materially because of new evidence or changed circumstances.’” Petition at 2 (quoting 49 C.F.R. § 1115.3(b)(1)). However, as the Board has repeatedly stated, information and arguments do not constitute “new

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<sup>1</sup> The Petition also embraces *Tongue River R.R.—Rail Construction and Operation—In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket 30186, and *Tongue River R.R. Company—Rail Construction and Operation - Ashland to Decker, MT*, STB Finance Docket No 30186 (Sub-No. 2).

evidence” or “changed circumstances” under 49 C.F.R. § 1115.3(b)(1) where the information and arguments were presented to or could have been presented to the Board in the Board’s previous proceedings.<sup>2</sup> NPRC provides virtually no evidence that was unavailable at the time of its July 26, 2010 Petition to Reopen. Rather, the Reconsideration Petition focuses almost entirely on the same evidence and arguments regarding the Otter Creek coal leases and climate change that were presented in the Petition to Reopen. While NPRC now presents additional arguments that TRRC has not detrimentally relied on the Board’s decisions in these proceedings and that the Board’s future actions in these proceedings will constitute a “major federal action,” these arguments do not constitute new evidence or circumstances, and could have been made in the original Petition to Reopen. In any event, they do not justify reopening or reconsideration.

NPRC includes three items of information in the Reconsideration Petition that were not available at the time NPRC filed its Petition to Reopen, but none of these materially affect the Board’s prior decisions, and two of them do not constitute “new evidence” at all. First, NPRC attaches a January 10, 2010 application of Otter Creek Coal, LLC for coal prospecting. Reconsideration Petition at Exhibit D. NPRC previously filed this application with the Board as

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<sup>2</sup> See, e.g., *Pro-Go Corp.—Operation Exemption—In Suffolk County, NY*, Finance Docket No. 35120, 2008 STB LEXIS 332 at \*3 (served June 13, 2008) (“[E]vidence does not qualify as ‘new evidence’ if it could have been placed before the Board in the original proceeding.”) (citing *Town of Springfield v. Surface Transp. Bd.*, 412 F.3d 187, 189 (D.C. Cir. 2005)); *David Monte Verdi, etc.—Continuance in Control Exemption—Mohawk & Adirondack R.R. Co., Inc.; Mohawk & Adirondack R.R. Co., Inc.—Acquisition and Operation Exemption—Consolidated Rail Corp.*, Docket Nos. 31843, 31846, 1992 ICC LEXIS 221 at \*3 (served Oct. 30, 1992) (petition for reconsideration denied when unaccompanied by new evidence); *Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, Finance Docket No. 35057, 2008 STB LEXIS 499, at \*8 (served Sept. 26, 2008) (“[T]he veto statement is not ‘new evidence’ for purposes of seeking reconsideration. Evidence does not qualify as ‘new’ if it could have been placed before the Board in the original proceeding. Here, the parties could have sought to supplement the record with the veto statement before the Board reached its decision in February 2008.”) (internal citation omitted).

an attachment to its February 23, 2011 supplemental submission in support of its Petition to Reopen.<sup>3</sup> Thus, this application (which is no more than a preliminary first step in the permitting of a coal mine and which contains no information useful for purposes of STB environmental review) is not “new evidence” that would warrant reopening or support further environmental review.

Second, NPRC attached as Exhibit C to its Reconsideration Petition an excerpt from an October 6, 2010 Bureau of Land Management Environmental Assessment (“BLM EA”) that mentions the TRR line and Otter Creek mines. This BLM EA also could have been filed by NPRC with its February 17, 2011 letter supplementing its Petition to Reopen, but was not.<sup>4</sup> This is therefore not new evidence.<sup>5</sup> Further, BLM’s EA underscores that, “Arch’s proposed mining plans are currently under development and are unknown at this time.” This statement obviously does not support reopening the EISs for the TRRC line to further consider such mine development at this time.

Third, NPRC points to the fact that on July 1, 2011, the ownership structure of TRRC changed, with Arch Coal obtaining a one third interest in the company that now owns the stock of the railroad. This fact is the only “new evidence” or “changed circumstance” presented by

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<sup>3</sup> See Exhibit A to the Feb. 17, 2011 Letter from NPRC.

<sup>4</sup> See *Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, Finance Docket No. 35057, 2008 STB LEXIS 499, at \*8 (served Sept. 26, 2008) (holding that evidence was not “new” because “the parties could have sought to supplement the record...before the Board reached its decision in February 2008.”).

<sup>5</sup> Further, while NPRC cites the BLM EA for the fact that BLM considers mining at Otter Creek to be reasonably foreseeable, NPRC asserts that BLM has viewed the Otter Creek mines as reasonably foreseeable since 2007. Reconsideration Petition at 12, n. 8. This assertion is unsupported, but even if true offers further proof that NPRC is not presenting new evidence here.

NPRC in the Reconsideration Petition. However, this new evidence does not support reopening, as discussed below.

**II. There Is No New Evidence Regarding Otter Creek Mine Development That Provides A Basis For Altering The Board's Conclusions**

Part of the Board's rationale for denying the Petition to Recopen is that TRR and Otter Creek are not connected actions because the Otter Creek tracts would not be entirely dependent on the TRR to transport the mined coal, and the TRR line will have financial viability without the Otter Creek coal mines. June 15 Decision at 12. The Petition does not refute this determination.

As the Board notes, "connected actions" are ones that are "closely related" because they either (1) "[a]utomatically trigger other actions which may require [EISs];" (2) "[c]annot or will not proceed unless other actions are taken previously or simultaneously;" or (3) "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). In support of its argument that TRR line and the Otter Creek mines are connected actions, NPRC cites two points.

First, it cites a statement from a TRRC official indicating his belief that the TRR line is essential for the development of the Otter Creek mines. Petition at 11. This statement is not "new evidence," for purposes of the Reconsideration Petition or the Petition to Recopen because it was part of TRRC's 2003 Supplemental Evidence, a fact acknowledged by NPRC. Petition at 11 & n. 4.

Second, NPRC cites the fact that Arch Coal now owns an interest in the entity that owns the stock of TRRC. Petition at 11. NPRC argues that the new ownership structure demonstrates that the TRR line and the potential Otter Creek mines are "connected actions" under NEPA for purposes of environmental review. However, the fact that Arch now owns a minority share of



the company that owns all of the shares of TRRC does not establish that development of the Otter Creek mines is entirely dependent on the TRR line or that TRR is not viable without the Otter Creek mines, *i.e.*, that the mines and railroad are connected actions.

Arch's involvement in the ownership of the TRR line and the mines does not make the development of mines at Otter Creek any more certain than it was before; *e.g.*, the leases of the Otter Creek tracts to a subsidiary of Arch still need to survive judicial review that remains pending in the Montana state courts,<sup>6</sup> and mining cannot be undertaken until permits are granted by the Montana Department of Environmental Quality pursuant to state law<sup>7</sup> following extensive environmental review by the state under Montana's Environmental Policy Act, a process likely to take several years.<sup>8</sup> Beyond these uncertainties, NPRC has failed to demonstrate that further environmental analysis under a "connected action" rubric at this time would materially change the results of the extensive cumulative railroad/mining analysis previously undertaken by the Board in its *Tongue River I* EIS.<sup>9</sup>

Even if the Board did view Otter Creek and the TRRC as connected actions, however, this fact should not change the Board's conclusions. Largely ignored by NPRC is the fact that the Board has already extensively analyzed the cumulative effects of the "related actions" of Otter

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<sup>6</sup> See *Montana Envtl. Info. Ctr. v. Mont. Bd. of Land*, Case No. DV-38-2010-2481 (Mont. Dist. Ct., filed May 13, 2010); *N. Plain Resource Council, Inc. v. Mont. Bd. of Land Comm'rs*, Case No. DV-38-2010-2480 (Mont. Dist. Ct., filed May 12, 2010).

<sup>7</sup> See Mont. Code Ann. §§ 82-4-121, 82-4-221.

<sup>8</sup> See Mont. Code Ann. § 75-1-201 et seq.

<sup>9</sup> NPRC's reliance on *Connor v. Burford*, 848 F.2d 1441 (9<sup>th</sup> Cir. 1988) on the question of whether the Otter Creek mining remains speculative is not persuasive. In that case, an agency failed altogether to prepare an EIS. As noted, here the Board has already assessed in its prior EISs the impacts of the related actions of mining in the Otter Creek area and the railroad. No developments cited by NPRC suggest the need for conducting further analysis.

Creek mining and the TRR rail line in *Tongue River I*.<sup>10</sup> NPRC has failed to show that this extensive analysis requires supplementation under the applicable standards. See CEQ Regulation at 40 C.F.R. § 1502.9(c) (supplementation required only “if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1980) (supplementation not required every time some new information becomes available)

NPRC claims that without supplemental environmental analysis the Board cannot know if its *Tongue River III* analysis regarding air quality impacts at the utility plants receiving the coal would be altered by including an additional 18 million annual tons of Otter Creek coal.

Reconsideration Petition at 14. However, as the Board explained in its denial of the Petition to Reopen, determining whether the additional Otter Creek coal tonnage would alter its conclusions

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<sup>10</sup> In *Tongue River I*, the Board recognized the potential development of a projected total of five mines in the Ashland/Birney/Otter Creek area as “related actions” to the construction of the railroad and analyzed the cumulative environmental impact of this assumed mine development in both the Draft EIS and Final EIS. Accordingly, Chapter 4 of the Draft EIS and the Final EIS in *Tongue River I* sets forth an analysis, for each studied category, of the impacts of TRRC rail construction, rail operation, “downline” operations, mine development and operation related to the railroad, and the overall impacts of rail and mining activities at these assumed mines in the Otter Creek and other TRRC-served areas. See Chapter 4 of the *Draft Environmental Impact Statement, Tongue River Railroad Company-Rail Construction and Operation-In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (served July 15, 1983) and the *Final Environmental Impact Statement, Tongue River Railroad Company-Rail Construction and Operation-In Custer, Powder River and Rosebud Counties, MT*, STB Finance Docket No. 30186 (served Aug. 23, 1985). In *Tongue River II*, the Board adopted the findings of *Tongue River I* with respect to the environmental impacts of mining in the Otter Creek area. See *Draft Environmental Impact Statement, Tongue River R.R.-Rail Construction and Operation- Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No.2) at 3-16 (served July 17, 1992). And in *Tongue River III*, the Board reviewed the findings of *Tongue River I* and *II* with respect to the potential cumulative impacts related to rail and mine development and determined that the prior impacts analyses remained valid. *Final Supplemental Environmental Impact Statement, Tongue River Railroad Company, Inc.-Construction and Operation-Western Alignment*, STB Finance Docket No. 30186 (Sub-No.3) at 2-33 (served Oct. 13, 2006) (“*TRRC III FSEIS*”).

is a simple and straightforward exercise. June 15 Decision at 9-12. In *Tongue River III*, the Board carefully reviewed the coal demand analysis it had performed based on the coal traffic of the proposed Dakota, Minnesota & Eastern Railroad (DM&E) and prepared a full analysis comparing the likely impacts on coal consumption and associated emissions in the TRRC case to these impacts in DM&E.<sup>11</sup> The Board found that the TRRC project is less likely to increase coal consumption and related air emissions than the DM&E project, where the increase in emissions was found to be *de minimis*, because of the smaller amount of coal TRRC would carry, the nature of the TRRC project, and the kind of coal TRRC would transport.<sup>12</sup> Adding the projected 18 million tons of coal per year from Otter Creek would not alter this assumption. This addition would bring the estimate of coal transported by TRRC up to 58 million tons per year, which is only slightly more than half of the 100 million tons DM&E was projected to transport per year.

NPRC claims that a more accurate estimate of Otter Creek coal output is 33.2 million tons per year (although NPRC provides no explanation as to why this estimate is superior to the Board's estimate of 18 million tons.) Reconsideration Petition at 14. Even if 33.2 million tons per year were added to the Board's analysis, the total tonnage per year to be transported by the TRRC would be only 77.2 million tons, still well below the 100 million tons that was determined not to have an air quality impact in *DM&E*. Thus, including Otter Creek coal in the cumulative air analysis would not alter the Board's conclusion that TRRC would have less of an effect on coal consumption and resulting emissions than DM&E. The Board's June 15 Decision persuasively demonstrates that there is no point in performing a supplemental environmental analysis in the face of facts that show that it would not yield any materially different results.

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<sup>11</sup> See *TRRC III FSEIS* at 2-34 to 2-58.

<sup>12</sup> *Id.*

NPRC argues that even if TRRC does not increase the demand for coal, the Board is required to analyze the other impacts associated with Otter Creek and the railroad on the people, water and wildlife of the Tongue River Valley. Reconsideration Petition at 14-15. However, as discussed above and as noted by the Board in its denial of the Petition to Reopen, the Board has already performed this analysis in *Tongue River I*. See June 15 Decision at 9, n. 17 & 18.

### **III. There Is No New Evidence Regarding Climate Change That Warrants Reopening**

NPRC claims that the climate change reports, papers and cases presented to the Board in its Petition to Reopen are “new evidence” because they were published after *Tongue River III* ended. Reconsideration Petition at 15. However, because this information was submitted to the Board in the Petition to Reopen (and found to be an insufficient basis for reopening), it cannot now constitute “new evidence” warranting reconsideration. Further, as the Board notes, this information was not even “new evidence” when it was submitted as part of the Petition to Reopen, because studies regarding the effect of GHGs on climate change were available prior to the Board’s environmental review in *Tongue River III*.

Even if the information on climate change could be regarded as “new evidence,” NPRC has not shown that this information would materially affect the Board’s conclusion that the TRRC project will have a *de minimis* effect on air emissions, including GHGs. Because NPRC has failed to make this showing, it has failed to meet the standard for reconsideration under the Board’s rules at § 1115.3. If the mere existence of new studies regarding climate change were sufficient to require reopening, reconsideration, or supplementation, the environmental review process would be virtually never ending.

NPRC’s reliance on *Friends of Atglen-Susquehanna Trail Inc. v. STB*, 252 F.3d 246 (3<sup>rd</sup> Cir. 2002) for the proposition that the Board cannot ignore scientific views is misplaced. Reconsideration Petition at 5. In that case, the Court reversed an STB decision because the

agency had considered only the Petitioner's claimed new evidence; "It did not consider whether [the petitioners there] had submitted evidence of substantial changed circumstances." 252 F.3d at 264. Here, in contrast, the STB fully discussed NPRC's claims of changed circumstances, including the climate change and GHG claims.<sup>13</sup>

#### **IV. NPRC's Detrimental Reliance Argument is Misplaced**

NPRC takes issue with the Board's determination in the June 15 Decision that TRRC's detrimental reliance on the Board's final decisions was an appropriate factor, among others, to consider in denying reopening. Of course, TRRC's detrimental reliance on the Board's previous decisions is neither "new evidence" nor a "changed circumstance"; NPRC could have presented its arguments regarding TRRC's detrimental reliance in support of its Petition to Reopen but chose not to do so.<sup>14</sup> Therefore, this issue should not be further considered by the Board at this stage.<sup>15</sup>

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<sup>13</sup> NPRC also cites *Westlands Water Dist. v. US Department of Interior*, 275 F.Supp.2d 1157 (E.D. CA. 2002) for the proposition that new developments in climate change science require EIS supplementation. However, the court in that case found that the agency there had improperly deferred consideration of certain issues and failed to analyze the impacts of new mitigation measures included in the final EIS. That case does not support the proposition that supplementation is required whenever new scientific evidence becomes available or where, as here, the agency did consider GHG emissions and determined that the TRRC project would not be a significant source of air emissions. See June 15 Decision at 13-17. Given the Board's findings in that regard, NPRC's citation of *Essex County Preservation Assn. v. Campbell*, 536 F.2d 956 (1<sup>st</sup> Cir. 1976) is likewise unavailing. The changed circumstance offered in that case as a basis for supplementation was one that called into question certain key estimates relied on in the initial EIS. Here, nothing has been offered by NPRC that should cause the Board to question its determination that the TRRC line will not be a significant source of air emissions.

<sup>14</sup> *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), upon which NPRC relies at page 4 of its Reconsideration Petition does not support the "balancing" argument for which it is cited. In any event, that case involved specific provisions of the Federal Communications Act concerning reopening, which the Court emphasized were not the same as those of other agencies.

<sup>15</sup> NPRC does not purport to claim any material error in the Board's June 15 Decision, and thus cannot now claim that the Board materially erred when it determined that TRRC has

Even if the Board does consider NPRC's argument regarding detrimental reliance, this argument should not alter the Board's conclusion. While TRRC has not yet begun construction or prepared final design plans for the line, there has been a great deal of reliance on the Board's previous decisions. This is perhaps best evidenced by the decision of TRRC's new owners to invest substantial sums to acquire an interest in the railroad. The value of these investments surely would be impacted if the Board were to reopen the proceedings and require potentially lengthy additional environmental analysis. In addition, even before these investments were made, TRRC itself had invested substantial resources in defending the STB's decisions in the U.S. Court of Appeals for the Ninth Circuit; negotiating an easement agreement that would allow TRRC to cross certain state-owned properties along its line; lobbying to maintain eminent domain rights in the face of efforts of NPRC and others to curtail these rights; consulting with secondary permitting agencies and working toward a new Programmatic Agreement, among other steps.

If the Board was incorrect about the extent of this detrimental reliance, however, such an error would not be material because the degree of TRRC's detrimental reliance was not the sole basis on which the Petition to Reopen was denied. In its June 15 Decision at page 5,<sup>16</sup> the Board also pointed to the need for "administrative repose" in Board proceedings as a basis for not lightly reopening cases decided years ago. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55 (1978) ("As we have said in the past: 'Administrative consideration of evidence .

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detrimentally relied on the Board's decisions. In any event, an error is not material if correcting it would not alter the Board's decision, and that is exactly the situation with the Board's detrimental reliance determination, as shown here. *See Port of Pend Oreille d/b/a Pend Oreille Valley R.R.—Acquisition and Operation Exemption—The Burlington Northern & Santa Fe Railway Co.*, Finance Docket No. 33561, 2000 STB LEXIS 246 at \* 13 (served May 2, 2000).

<sup>16</sup> *Tongue River R.R. Co., Inc.—Construction and Operation—Western Alignment*, Finance Docket 30186 (Sub-No. 3), slip op. at 5 (served June 15, 2011) ("June 15 Decision").

. . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed]. . . . If, upon the coming down of the order, litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.” (quoting *ICC v. Jersey City*, 322 U. S. 503, 322 U. S. 514 (1944)).

Further, such jurisprudential factors aside, the Board found that Petitioners had simply not met their burden to show facts or circumstances warranting reopening.<sup>17</sup> The Board explained why each of NPRC’s arguments in the Petition to Reopen would not materially affect the Board’s prior decisions, and on that basis alone the June 15 Decision was fully justified.

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<sup>17</sup> See e.g., June 15 Decision at 10 (“None of the new information or changed circumstances alleged by NPRC suggests that the demand-based methodology we used in *Tongue River III* would be sufficiently impacted by the inclusion of additional prospective coal tonnage from the Otter Creek tracts to warrant a supplemental analysis at this time.”); *id.* at 12 (“The existing record supports the conclusion that development of the Otter Creek tracts would not be entirely dependent on the TRR to transport the mined coal, and that the TRR line will have financial viability without the Otter Creek coal mines.”); *id.* at 15 (“These ‘new’ studies and reports may more firmly establish that GHG emissions are indeed affecting the global climate, but they do not discredit the Board’s previous conclusion (discussed above) that the less than 1% increase in air emissions, including GHG emissions, resulting from increased demand for coal caused by the TRR project will have a negligible impact on the environment.”); *id.* (“First, the Draft Guidance is only a draft... Second, even if it becomes final, it will apply prospectively only... Third, because NPRC has pointed to no evidence that the TRR’s burning of diesel fuel will directly result in the emission of GHGs above the threshold for analysis set forth in the Draft Guidance, the guidance is not applicable to this case. Lastly, we addressed the cumulative impact of GHG air emissions from power plants burning coal transported by the TRR in the prior EISs, and we do not believe that the Draft Guidance requires any more in-depth analysis now because these impacts are beyond the geographic scope for a proper cumulative effects analysis.”)

**V. NPRC's Argument Concerning Whether There Remains a Major Federal Action in These Proceedings is Incorrect**

In the June 15 Decision denying the Petition to Reopen, the Board notes that agencies do not have a duty under NEPA to supplement their environmental analyses where there is no remaining major federal action, the Board having already granted TRRC authority to construct and operate the rail line. June 15 Decision at 6. NPRC argues on reconsideration that major federal action remains. However, it made essentially the same argument in its Petition to Reopen, underscoring that it is simply now re-arguing the same points it has already argued and lost. Petition to Reopen at 17.

In arguing that major federal action remains, NPRC now relies on *Sierra Club v. Bosworth*, 465 F.Supp.2d 931 (N.D. Cal. 2006) and *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service*, 2007 U.S. Dist. LEXIS 51974 (July 16, 2007), both of which involved very different situations than the present case. Both cases involved federal approval of timber sales contracts, and in both cases the courts relied on the fact that the Forest Service retained the power to terminate the contracts if environmental conditions changed. *Sierra Club*, 465 F. Supp. 2d at 938-39; *Klamath-Siskiyou*, 2007 U.S. Dist. Lexis 51974 at \*3. According to the court in *Sierra Club*, the fact that the contract allowed for unilateral termination meant that "approval of the contracts [was] not effectively final..." *Sierra Club*, 465 F. Supp. 2d at 939.

In the present case, TRRC has received administratively final authorization to construct its rail line. While the Board has the general authority to reopen its decisions based on new evidence or changed circumstances, the Board has authority to do this at any time, even after construction is completed. If the existence of this authority is sufficient to establish that major federal action remains, there would never be a situation in which major federal action did not remain, because a party could always create the need for a further "major federal action" by



filing a petition to reopen long after a final decision had been issued. This would eviscerate the whole concept of administrative finality, contrary to settled law.<sup>18</sup>

Moreover, the question of whether or not major federal action remains was not critical to the Board's decision to deny the Petition to Reopen, particularly in view of the Board's detailed findings as to why reopening was not justified. In denying the Petition to Reopen, the Board found that NPRC failed to show any grounds that would materially alter the Board's decision because: (1) the Otter Creek coal mining leases are not a changed circumstance that provide any basis for altering the Board's conclusion that any increased coal demand would have an insignificant effect on air emissions and the environment; (2) the asserted "new evidence" regarding the effects of greenhouse gases ("GHGs") on climate change is not new within the meaning of 49 U.S.C. § 722(c); and (3) the alleged changes in law subsequent to the Board's final 2007 decision relating to GHG emissions and climate change are not relevant to the Board's licensing authority, nor do they carry retroactive effect even if applicable, and thus are not a changed circumstance that would affect the Board's prior decision. June 15 Decision at 7-8.

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<sup>18</sup> NPRC's long-winded discussion of the Board's continuing oversight role is irrelevant to the question here of whether the Board should reconsider its decision that reopening is not warranted on the basis of the points raised by NPRC. Moreover, NPRC's arguments are not correct. For example, NPRC claims at page 8 of its Reconsideration Petition that the Board "still has to authorize the final alignment after the TRRC completes its final engineering studies." The Board of course has already authorized the corridor for the final alignment in its decisions in the TRRC proceedings. Only if TRRC were to seek to construct its line outside of the approved corridor might further Board environmental review be required to determine if there might be significant effects. See *Tongue River III* Final SEIS at 2-7. NPRC also argues that the Board's role as a member of the Task Force established by *Tongue River III* mitigation measure 14, and particularly the Task Force's role in approving certain mitigation plans developed by TRRC, constitute a major federal action. However, the STB's continuing oversight over the implementation of mitigation measures required under its decision is not a "major federal action" under NEPA; rather, the mitigation measures are merely required conditions on the Board's approval of the construction and operation of the TRRC line, which is the only "major federal action" subject to NEPA. See 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18.

These findings, all well founded, were independent of the Board's conclusion that no major federal action remains and independently support the June 15 Decision denying reopening.

### **CONCLUSION**

Because NPRC provides virtually nothing in the way of new evidence or changed circumstances that might have a material impact on its prior decisions, NPRC has failed to meet its burden of demonstrating a basis for reconsideration. For all of the reasons discussed above, TRRC respectfully requests that the Board deny the Reconsideration Petition.

Respectfully,



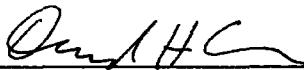
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August 25, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of August 2011, I have caused a copy of the foregoing Reply to Petition for Reconsideration to be served by first-class mail, postage prepaid, on counsel for the parties of record in STB Finance Docket Nos. 30186, 30186 (Sub-No. 2), and 30186 (Sub No.3).

  
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David H. Coburn